Yee Wen Chin v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05–42 OF 2006 AND W-05–85 OF 2003
GOPAL SRI RAM, HASAN LAH AND VINCENT NG JJCA
23 JULY 2008

Criminal Law — Dangerous drugs — Trafficking — Reduced to lesser charge of possession — Appeal against conviction by prosecution and accused — Whether prosecution had at close of its case established prima facie case of trafficking — Whether at close of whole case trial judge was correct in finding accused guilty of possession of drugs set out in both charges

Criminal Procedure — Trial — Misdirection — Whether information received by Chief Inspector was a 'complaint' — Whether trial judge's ruling that substance of information received was inadmissible was made in breach of rules of natural justice — Whether there was breach of Diplock Rule — Whether substantial injustice occurred

Acting on information received by one Chief Inspector Roslan bin Hussin ('the Chief Inspector'), the police took their position near a parking lot close to Block 25B 1, Condo Sri Miharja when they saw the accused emerged from the said block and heading towards a motorcar No WFP2429. According to the Chief Inspector and his fellow officer, the accused was carrying a red plastic bag in his hand when he emerged from the block of flats. The accused then entered the car, which belonged to him, when the Chief Inspector and his team arrested him. Then as the Chief Inspector administered the statutory caution the accused remained silent. When the police searched the car they recovered a red plastic bag from the front passenger seat which contained two packages. Subsequent chemical analysis of the contents of these two packages revealed that they each contained 1000 pills of methylenedioxymethamphetamine ('the dangerous drugs'), a proscribed drug under the Dangerous Drugs Act 1952 ('DDA'). The accused was thereafter charged and tried for two offences, that was, for trafficking in the first package of the dangerous drugs and for being in possession of the second package of the dangerous drugs. At the close of the case for the prosecution the trial judge held that the prosecution had not established a prima facie case of trafficking on the first charge and accordingly reduced the first charge to one of possession and called upon the accused to enter his defence to both charges. The accused's defence was that he was unaware of the existence of the

red plastic bag. According to the accused, he had emerged from the apartment building that belonged to one Woo Kok Meng (Woo), who together with another had borrowed the accused's car earlier on the day in question. When the accused was handed back his car keys he had decided to go out and while leaving he had taken along with him a red plastic bag that allegedly contained a pair of ladies shoes. It was the accused's defence that when he unlocked the door of his car he only had time to place the bag he was carrying on the floor behind the driver's seat when the police accosted him. Therefore he alleged that he had no knowledge of the contents of the red plastic bag in the front passenger seat and its contents. At the trial, in the course of cross-examining the prosecution witnesses it was extracted from the Chief Inspector that the information he had received was that one Woo was trafficking in drugs at the place in question. The accused took advantage of this fact to show that Woo was the real trafficker and that he was entirely innocent. At the conclusion of the case the accused was sentenced to 13 years imprisonment in respect of the first charge and two years in respect of the second with the two charges to run consecutively. The public prosecutor dissatisfied with the reduction of the charge appealed against the judgment. At the same time, the accused who was also dissatisfied with the decision appealed for the conviction on both charges to be quashed. The gist of the public prosecutor's case is that the trial judge had failed to draw the proper inferences from the totality of the evidence led by the prosecution. The accused, on the other hand, submitted that his defence was not properly evaluated by the trial judge.

Held, dismissing both appeals and affirming the sentences:

(1) The fact that the accused was seen emerging from the block of flats towards his car carrying a red plastic package, was not mentioned by the Chief Inspector in his police report after the accused's arrest. It was also not mentioned by the deputy public prosecutor in his opening statement at the trial. If the Chief Inspector and his fellow inspector had mentioned to the investigating officer that they had seen the accused carrying the red plastic bag at the material time, it was reasonable to have expected the prosecution to state this as part of its case in its opening statement because this fact was of critical importance in establishing the element of trafficking. As such, the evidence of the prosecution left in doubt the question whether the accused had indeed carried the red plastic bag containing the dangerous drugs. Therefore, on reasons different from those given by the trial judge, the prosecution had not on a maximum evaluation of its evidence established a prima facie case of trafficking at the close of the prosecution's case (see para 6).

(2) There are cases that have held that where drugs are found in a car the presumption under s 37(d) of the DDA cannot be invoked because a car is not 'anything whatsoever containing any dangerous drug'. Therefore the prosecution could not rely on this presumption to establish the charge of possession. However, it was open to the prosecution to rely on reasonable or fair inference that may be drawn from undisputed facts to show that the accused had actual possession of the red plastic bag and its contents. These undisputed facts were the fact that the accused was the owner of the car in question and there was also no doubt that the red plastic bag which contained the dangerous drugs was found in the accused's car. In the ordinary course of events nobody puts their things into another person's car. Moreover from the evidence led by the prosecution no one other than the accused could have had access to the accused's car or its use. These facts and circumstances when taken together reasonably support the inference that it was the accused and no other person who was in possession of the red plastic bag and its contents, and therefore there was no question of an acquittal at the close of the prosecution's case (see para 8).

(3) Although the accused in his defence alleged that he was carrying a red plastic bag that contained a pair of ladies shoes, the police found no other bag other than the bag with the dangerous drugs in the car. Based on this the trial judge found the accused to be wanting in credibility. The fact that the accused must have lied would have caused grave doubt on his credibility and the trial judge's finding on the credibility of the accused's evidence was therefore accepted without any reservation. It was a pure question of fact whether the accused had actual custody and control and possession of the red plastic bag that contained the dangerous drugs and in accordance with well established principles there was no need to disturb such findings of fact. As such, it was not open to the accused to complain that his defence was not properly evaluated (see para 10).

(4) The evidence adduced in the course of cross-examination implicating one Woo casted serious doubt on the critical question whether it was the accused who was the real trafficker. Although s 40 of the Act does not preclude the admission of such evidence it prevents the disclosure of the identity of the informant and any complaint. Although the word 'complaint' is not defined in the Act, suffice to say that the information received by the Chief Inspector in this case was not a complaint on the facts of this case as it did not implicate the accused. However, the trial judge's ruling that the substance of the information received was inadmissible because it was made in breach of the rules of natural

justice. This was because the Diplock rule that prevents a judge from disregarding the rules by which counsel are bound was clearly breached. However, having regard to the overwhelming evidence in the prosecution's favour on the amended charge of possession there had been no substantial miscarriage of justice despite this serious misdirection by the trial judge. In short the error by the learned judge had not prejudiced the accused in the final outcome of his case (see para 14–16).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima daripada Ketua Inspektor Roslan bin Hussin (Ketua Inspektor), pihak polis mengambil tempat berhampiran tempat letak kereta Blok 25B 1, Kondominium Sri Miharja apabila mereka melihat tertuduh muncul dari blok tersebut dan menuju ke arah kereta bernombor pendaftaran WFP 2429. Menurut Ketua Inspektor dan rakan-rakan polisnya, tertuduh membawa satu plastik merah apabila dia muncul dari blok tersebut. Tertuduh kemudiannya masuk ke dalam keretanya apabila Ketua Inspektor dan pasukan polisnya menangkap tertuduh. Apabila Ketua Polis membacakan percakapan beramaran, tertuduh mendiamkan diri. Ketika polis menggeledah kereta tersebut, mereka menjumpai satu plastik merah dari tempat duduk hadapan bahagian penumpang yang mengandungi dua bungkusan. Analisis kimia atas kandungan dua bungkusan tersebut menunjukkan bungkusan tersebut mengandungi 1000 biji pil methylenedioxymethamphetamine ('dadah berbahaya'), yang diharamkan di bawah Akta Dadah Berbahaya 1952 ('ADB'). Tertuduh didakwa dan dibicarakan atas dua kesalahan, iaitu, mengedar bungkusan pertama dadah berbahaya tersebut dan memiliki bungkusan kedua dadah berbahaya tersebut. Pada akhir kes pendakwaan, hakim bicara memutuskan bahawa pihak pendakwaan gagal membuktikan satu kes prima facie terhadap kesalahan mengedar pada pertuduhan pertama dan dengan itu mengurangkan pertuduhan pertama kepada pemilikan dan memanggil tertuduh membela diri bagi kedua-dua pertuduhan. Dalam pembelaannya, tertuduh menyatakan bahawa dia tidak tahu tentang kewujudan beg plastik merah tersebut. Menurutnya, dia keluar dari sebuah pangsapuri milik Woo Kok Meng ('Woo'), yang mana bersama-sama orang lain, telah meminjam keretanya sebelum dia ditangkap. Setelah dia mendapat kembali kunci keretanya, dia bercadang untuk keluar dan ketika beredar dia membawa bersama satu beg plastik merah yang dikatakan berisi sepasang kasut perempuan. Tertuduh juga membela dirinya dengan mengatakan bahawa apabila dia membuka pintu keretanya, dia cuma sempat meletakkan beg plastik itu di lantai kereta bahagian belakang tempat duduk pemandu apabila dia dihampiri polis. Oleh itu, dia mendakwa dia tidak tahu apa isi dalam beg plastik merah yang terletak di tempat duduk penumpang bahagian

hadapan dan isinya. Dalam perbicaraan, semasa soal balas saksi pendakwaan, Ketua Inspektor menyatakan bahawa maklumat yang diterimanya ialah seseorang yang bernama Woo yang mengedar dadah di tempat tersebut. Tertuduh mengambil kesempatan atas kenyataan ini bagi menunjukkan bahawa Woo adalah pengedar yang sebenarnya dan dia langsung tidak bersalah. Pada penutup kes ini, tertuduh dihukum dengan hukuman penjara selama 13 tahun bagi pertuduhan pertama dan dua tahun bagi pertuduhan kedua, kedua-dua hukuman dijalankan berturutan. Pendakwa raya tidak puas hati dengan pengurangan pertuduhan tersebut merayu terhadap penghakiman tersebut. Pada masa yang sama, tertuduh juga tidak puas hati dengan keputusan tersebut dan merayu agar sabitan kedua-dua pertuduhan dibatalkan. Inti pati kes pihak pendakwaan ialah hakim bicara gagal membuat inferens yang wajar daripada keseluruhan keterangan pihak pendakwaan. Tertuduh pula, sebaliknya menyatakan bahawa pembelaannya tidak dinilai dengan sempurna oleh hakim bicara.

Diputuskan, menolak kedua-dua rayuan dan mengesahkan hukuman:

(1) Fakta bahawa tertuduh dilihat muncul daripada blok pangsapuri menuju ke keretanya membawa beg plastik merah, tidak dinyatakan oleh Ketua Inspektor dalam laporan polisnya selepas menangkap tertuduh. Perkara itu juga tidak disebut oleh pendakwa raya dalam ucapan pembukaannya semasa perbicaraan. Jika Ketua Inspektor dan rakan-rakan inspektornya memberitahu pegawai penyiasat bahawa mereka ada melihat tertuduh membawa beg plastik merah pada masa yang penting itu, adalah wajar untuk menjangka pihak pendakwaan menyatakan fakta ini sebagai sebahagian daripada kesnya dalam ucapan pembukaannya oleh sebab fakta ini sangat penting dalam membuktikan elemen pengedaran. Maka, keterangan pihak pendakwaan menimbulkan keraguan sama ada tertuduh betul-betul membawa beg plastik merah yang mengandungi dadah berbahaya tersebut. Oleh itu, atas alasan yang berbeza daripada yang diberikan oleh hakim bicara, setelah menjalankan penilaian maksimum atas keterangan, pihak pendakwaan tidak berjaya mewujudkan satu kes prima facie atas kesalahan mengedar pada akhir kesnya (lihat perenggan 6).

(2) Terdapat kes-kes yang diputuskan bilamana dadah dijumpai dalam kereta, anggapan di bawah s 37(d) ADB tidak boleh digunakan kerana kereta bukanlah 'apa-apa yang mengandungi apa-apa dadah berbahaya'. Oleh itu, pihak pendakwaan tidak boleh bergantung kepada anggapan ini untuk membuktikan pertuduhan pemilikan. Walau bagaimanapun, ia terbuka untuk pihak pendakwaan bersandarkan kepada inferens yang munasabah atau adil yang boleh didapati daripada fakta-fakta yang tidak dipertikaikan bagi menunjukkan bahawa tertuduh mempunyai

A milikan sebenar beg plastik merah dan isinya. Fakta-fakta yang tidak dipertikaikan tersebut yang dimaksudkan ialah tertuduh merupakan pemilik kereta tersebut dan juga memang tidak dinafikan bahawa beg plastik merah yang mengandungi dadah berbahaya tersebut dijumpai dalam kereta tertuduh. Dalam keadaan biasa, tidak ada orang yang B meletakkan barangnya dalam kereta orang lain. Tambahan lagi, daripada keterangan pihak pendakwaan, tiada orang lain, selain tertuduh, yang boleh akses atau menggunakan kereta tertuduh. Fakta dan keadaan ini apabila dilihat secara bersama agak menyokong inferens bahawa tertuduhlah orangnya, dan bukan orang lain, yang C memiliki beg plastik merah dan isinya. Maka, tiada persoalan tentang pembebasan tuduhan di penutup kes pendakwaan (lihat perenggan 8).

(3) Walaupun dalam pembelaannya, tertuduh menyatakan bahawa dia membawa beg plastik merah yang berisi sepasang kasut perempuan, D polis tidak menjumpai beg lain selain beg yang berisi dadah berbahaya dalam kereta itu. Berdasarkan ini, hakim bicara berpendapat bahawa tertuduh kurang kredibilitinya. Fakta bahawa tertuduh tentunya berbohong akan mengakibatkan keraguan yang berat kepada kredibilitinya dan keputusan hakim bicara terhadap kredibiliti E keterangan tertuduh diterima sepenuhnya. Adalah menjadi persoalan fakta sama ada tertuduh mempunyai milikan dan kawalan sebenar terhadap beg plastik merah yang berisi dadah berbahaya. Malah menurut hukum prinsip pula tidak perlulah mempersoalkan keputusan sebegitu. Maka, tertuduh tidak boleh mengadu bahawa pembelaannya F tidak dinilai dengan sempurna (lihat perenggan 10).

(4) Keterangan yang dikemukakan semasa soal balas membabitkan seorang yang bernama Woo menimbulkan keraguan serius kepada persoalan penting sama ada tertuduhlah pengedar sebenar. Walaupun s 40 Akta G tidak menghalang keterangan seperti itu dikemukakan namun seksyen tersebut mencegah identiti pemberi maklumat dan sebarang aduan diketahui. Walaupun perkataan 'aduan' tidak ditafsirkan dalam Akta, namun, cukuplah dikatakan bahawa maklumat yang diterima oleh Ketua Inspektor dalam kes ini bukan aduan bagi maksud fakta kes ini H kerana tidak melibatkan tertuduh. Walau bagaimanapun, keputusan hakim bicara bahawa intisari maklumat yang diterima tidak boleh diterima sebagai keterangan oleh sebab menyalahi hukum keadilan semulajadi. Ini disebabkan oleh peraturan Diplock yang menghalang seorang hakim daripada tidak memberi perhatian atas I peraturan-peraturan yang wajib dipatuhi oleh peguam telah jelas dilanggar. Walau bagaimanapun, melihat kepada keterangan yang memihak kepada pihak pendakwaan bagi pertuduhan pindaan iaitu pertuduhan memiliki, tiada salah laku keadilan yang substansial walaupun berlaku salah arah serius oleh hakim bicara. Ringkasnya,

kekhilafan oleh hakim yang bijaksana tidak memprejudis tertuduh dalam keputusan akhir kesnya (lihat perenggan 14–16).]

Notes

For cases on misdirection, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4861–4866.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Alcontara a/l Ambross Anthony PP [1996] 1 MLJ 209 (refd)

Andy Bagindah v PP [2000] 3 MLJ 644 (refd)

Goi Ching Ang v PP [1999] 1 MLJ 507 (refd)

Hadmor Productions v Hamilton [1983] 1 AC 191 (refd)

Mahdi bin Ibrahim Bamadhaj v PP [2003] 2 SLR 226 (folld)

Mohamad Radhi v PP [1991] 3 MLJ 169 (folld)

Noor Mohamed v The King [1949] AC 182 (refd)

Sochima Okoye v PP [1995] 1 MLJ 538 (refd)

Subramaniam v PP [1956] MLJ 220 (refd)

Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132 (refd)

Legislation referred to

Criminal Procedure Code s 2
Dangerous Drugs Act 1952 ss 12(2), 37A, 37(d) 39A(1), 39B(1)(a), 40, 40(1), 40(2), 40(3)
Interpretation Acts 1948 and 1967 s 66

Appeal from: Criminal Trial Nos 45–52 of 2001 and 45–53 of 2001 (High Court, Kuala Lumpur)

Gooi Soon Seng (Gooi & Azura) for the appellant in Criminal Appeal No W-05–42 of 2006.

Nurulhuda Nur'aini bt Mohd Noor (Deputy Public Prosecutor, Attorney-General's Chambers) for the respondent in Criminal Appeal No W-05–42 of 2006.

Nurulhuda Nur'aini bt Mohd Noor (Deputy Public Prosecutor, Attorney-General's Chambers) for the appellant in Criminal Appeal No W-05–85 of 2003.

Gooi Soon Seng (Gooi & Azura) for the respondent in Criminal Appeal No W-05–85 of 2003.

Gopal Sri Ram JCA (delivering judgment of the court):

ORAL JUDGMENT

[1] This is the judgment of the court.

[2] There are two appeals before us this morning. One is by the prosecution. The other is by the accused. The background to these appeals is as follows.

[3] On 29 June 2001, at about 2.30pm PW5 (Chief Inspector Roslan bin Hussin) acting on information that he received, took a team of police officers to an apartment block at Taman Miharja. On arrival the police personnel took their position near a parking lot close to Lot 25 B 1, Condo Sri Miharja. After about 30 minutes had passed, PW5 saw a Chinese male, later identified as the accused, emerge from block 25 B 1. He saw the accused head towards a motorcar No WFP 2429. According to PW5 and his fellow officer PW6 (Detective Sub-Inspector Teoh Soy Lim) the accused carried a red plastic bag (exh P15) in his left hand. The accused then entered the car which was proved to belong to him. At this juncture, PW5 and his team went to the car, asked the accused to get out of it and identified themselves as police personnel. PW5 then administered to the accused the caution prescribed by s 37A of the Dangerous Drugs Act 1952 ('the Act'). The accused remained silent. The car was searched. The police recovered a red plastic bag from the front passenger's seat. The bag was opened and from it was recovered a package wrapped in a Chinese newspaper (exh P16) and a box containing something wrapped in a coloured wrapper (exh P17). Subsequent chemical analysis of the material found in these two packages showed that exh P16 contained 1000 pills of methylenedioxymethamphetamine (exh P19 and exh P21) and exh P17 contained 1000 pills of the same drug (exh P23), a proscribed drug under the Act. The accused was later charged and tried for two offences: first, for trafficking in exh P19 and P21 under s 39B(1)(a) of the Act; second for being in possession of exh P23 under s 12(2), punishable under s 39A(1) of the Act. At the close of the case for the prosecution the learned judge held that a prima facie case of trafficking had not been made out on the first charge. He accordingly reduced the first charge to one of possession and called upon the accused to make his defence to both charges. At the conclusion of the whole case, the accused was convicted and sentenced to 13 years imprisonment in respect of the first charge and two years in respect of the second charge, the sentences to run consecutively. The public prosecutor being dissatisfied with the reduction of the charge has appealed and asked that the judge's decision be reversed. The complaint is that the learned judge should have called for the accused's defence on the original first

charge of trafficking. The accused also being dissatisfied with the learned judge's decision has appealed asking for his conviction to be quashed on both charges.

[4] Before us a number of points were taken by both sides, most of which we find it unnecessary to deal with. In our judgment there are two issues which are germane to these appeals. The first is whether the prosecution had at the close of its case established a prima facie case of trafficking on the first charge. The second issue is whether at the close of the whole case the learned judge was correct in finding the accused guilty of possession of the drugs set out in both charges.

[5] Taking the first issue, the gist of the public prosecutor's case is that the learned judge failed to draw the proper inferences from the totality of the evidence led by the prosecution during its case. The learned deputy who argued the appeal submitted that had the learned judge properly appreciated the evidence of PW5 and PW6 he would have drawn the irresistible inference that the accused was trafficking in the drugs in question. These witnesses had seen the accused emerge from the building in question carrying exh P15 which was found to contain drugs. He had placed it in his car and would have driven off but for the intervention of the police. These acts of the accused when taken together with the quantity of the drugs he was carrying warrants the drawing of an inference that he intended to convey the drugs in question to some person known or unknown. Hence, the elements of actual trafficking under s 39B(1)(a) of the Act were prima facie established. So much for the prosecution's argument.

[6] Now, it is clear from the record provided to us that the first occasion on which the suggestion was made that the accused was carrying exh P15 when he emerged from the apartment block in question was during PW5's testimony. This fact found no mention in the police report lodged by PW5 after the accused's arrest, a matter readily admitted by the witness. Neither did this fact find any mention in the opening statement made by the learned deputy public prosecutor in the court below. If PW5 and PW6 had in their statements to the investigating officer mentioned the fact that each had seen the accused carrying exh P15 at the material time it is reasonable to have expected the prosecution to state this as part of its case in its opening statement. Because, it is a fact of such critical importance to establish the element of trafficking. We are therefore satisfied for reasons different from those given by the learned judge that the prosecution had not on a maximum evaluation of its evidence at the close of its case established a prima facie case of trafficking. The evidence for the prosecution left in doubt the question whether the accused had indeed carried exh P15 to his car with a view of driving off with the offending exhibits. Accordingly we are in agreement with

A the decision of the learned judge in amending the first charge and in calling for the defence of the accused on the amended charge.

[7] We are also unable to accept the submission of learned counsel for the accused that no case on any charge whatsoever had been made out by the B prosecution at the close of its case. Learned counsel submitted that since there was a doubt as to whether the accused had carried exh P15 to his car all that the prosecution was left with was the fact that the accused had entered his car and for a brief moment had been with exh P15. This, it was said, was insufficient in itself to make out a case of possession. C

[8] There are cases that have held that where drugs are found in a car the presumption under s 37(d) of the Act cannot be invoked because a car is not 'anything whatsoever containing any dangerous drug'. See, *Syed Ali bin Syed* D *Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132. We accept therefore that the prosecution cannot bring home the charge of possession by relying on the aforesaid presumption. But that said, it is open to the prosecution to rely on reasonable or fair inferences that may be drawn from undisputed facts to show that the accused did indeed have actual possession E of exh P15 and its contents. In the first place, there is the undisputed fact that the accused is the owner of the car in question. In the second place there is also no doubt that exh P15 was found in his car. At the close of the prosecution's case there were no inferences available in the accused's favour in relation to the issue of possession. In the ordinary course of events, nobody F will put his or her things in another person's car. There was nothing in the prosecution's evidence to show that such a thing had happened. Indeed there was nothing in the evidence led by the prosecution to suggest that anyone other than the accused had access to his car or its use. These facts and circumstances when taken together reasonably support the inference that it G was the accused and no else who was in possession of exh P15 and its contents. Accordingly, the fact that the accused was only momentarily in his car with the offending exhibits before his apprehension does not assist in repelling the prima facie inference of possession. We are therefore satisfied that no question of an acquittal at the close of the prosecution's case arises.

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[9] The accused when giving evidence in his defence stated that he was unaware of the existence of exh P15. According to him the following things happened. He was in an apartment in the building in question. That apartment belonged to Woo Kok Meng who together with one Goh Seng I Hing, a Singaporean, had borrowed the accused's car earlier on the day in question. Goh had later returned the car and handed the keys to the accused. It was only after this that the accused decided to go out. He took along with him a red plastic bag in which he carried a pair of ladies shoes. He went to his car, opened it and placed the bag on the floor behind the driver's seat. He

had hardly turned around when he was accosted by the police. He did not notice exh P15. He therefore had no knowledge of its contents.

[10] Now, it is in evidence which was accepted by the learned judge that the police had searched the accused's car and found no other plastic bag apart from exh P15. Based on the material before him the learned judge found the accused to be wanting in credibility. He was entirely within his province in making this finding. The fact that the accused had told a lie about the plastic bag with the ladies shoes in it must have caused grave doubt on his credibility. For our part we accept without any reservation the learned judge's finding on the credibility of the accused's evidence. It is a pure question of fact as to whether the accused had actual custody and control and possession of exh P15 and its contents. In accordance with well established principles we are not inclined to disturb the learned judge's findings of fact. See, *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644. There is therefore no ground on which it is open to the accused to complain that his defence was not properly evaluated. In our judgment it was.

[11] Before we conclude there is one point which we must deal with. It is of considerable importance. It has to do with the interpretation of s 40 of the Act which reads as follows:

(1) Except as hereinafter provided, no complaint as to an offence under this Act shall be admitted in evidence in any civil, or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.

(2) If any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, the Court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.

(3) If on trial for any offence under this Act the Court, after full inquiry into the case, is of opinion that the informer wilfully made in his complaint a material statement which he knew or believed to be false or did not believe to be true, or if in any other proceeding the Court is of opinion that justice cannot be fully done between the parties thereto without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit inquiry and require full disclosure concerning the informer.

[12] The section is relevant to the present case in the following way. In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v Public Prosecutor* [1991] 3 MLJ 169. That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v Public Prosecutor* [1995] 1 MLJ 538.

[13] Nowhere during the course of the trial did the prosecution take any objection to the defence adducing evidence about the information received by PW5 implicating Woo Kok Meng. Neither did the judge at any time until the close of the defence advert to this. However, when he came to write his judgment he held that the evidence given by PW5 about the contents of the information he had received at the material time was inadmissible because of s 40 of the Act. The learned deputy who argued this appeal has sought to support this finding. She relies on the decision of the Federal Court in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 to do so. Now, in *Alcontara* what Edgar Joseph Jr FCJ said was this:

> The penultimate point which arose for consideration concerned the admission of certain irrelevant, inadmissible and gravely prejudicial evidence, to wit, that part of the testimony of ASP Abdul Wahab wherein he gave an account of the briefing he had given his men on the night before he has mounted the road block to stop and search the car driven by the appellant; more particularly, he said this. 'I informed them [his men] that information had been received that a certain Indian would be traveling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah, proceeding from kawasan Permatang Bendahari towards Pulau Pinang.' Now, this statement by ASP Abdul Wahab was clearly based on hearsay, was prejudicial to the appellant, and therefore, inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to object.
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> In *Vijayaratnam v Public Prosecutor* [1926] MLJ 106, M Hashim J had to consider a similar point, and went so far as to say (at p 106 col 2D):

> I think if possible, the expression 'on information received' should not be used by police officers when giving evidence. It would appear to mean that somebody has given information, which may be hearsay, to the police and the police act on this information. In this particular case, the police witness went on to say that on arrival at the scene, he laid an ambush. This statement, read in conjunction with the expression 'on information received', would tend to indicate that the police had been told that an offence would be committed. In my opinion, this would, to say the least, cloud the issue when the trial commenced and it might to a certain degree prejudice the court against the appellant. To put it in another way, there was a probability that the court trying the appellant was, to a certain extent, influenced by the opening statement of the police witness. In my opinion, such a state of affairs should be avoided.

Whilst we agree with much of what M Hashim J said in that case, we consider that in appropriate circumstances, there is nothing objectionable in a law enforcement officer saying, by way of introduction that, 'acting on information received', he took certain steps in the investigation. However, when such testimony is given, care must be taken not to divulge the contents of the information, as happened in the present case, since this may well be open to the objection that it is hearsay and, in all probability, prejudicial to the accused. Moreover, we must mention that in trials for any offence under the Act, sub-ss (1) and (2) of s 40 provide for special rules of evidence relating to the protection of informers — but note the exception provided for under sub-s (3) of s 40.

Although the judge had not referred to that part of ASP Abdul Wahab's testimony, quoted above, the possibility that he was swayed by it could not be ruled out (see *Balasingham v Public Prosecutor* [1959] MLJ 193 at p 194, col 2F to H, per Ismail Khan J (later CJ Borneo), and its effect might well have been to prejudice the case for the appellant.

[14] It would be noted at once that the evidence in *Alcontara* about the information received was seriously prejudicial to the accused in that case whilst carrying no probative value whatsoever. In accordance with settled principles such evidence is inadmissible. See, *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; *Noor Mohamed v The King* [1949] AC 182. But the evidence in the present instance case is not at all prejudicial to the accused. It is in his favour. It goes to show that Woo Kok Meng may have been the true trafficker. Further, unlike the statement in *Alcontara*, it is not hearsay when viewed from the point of view of the object for which the evidence was sought to be admitted. See, *Subramaniam v Public Prosecutor* [1956] MLJ 220. The object of the defence was not to seek to establish the truth of the information received by PW5 but only the fact that he had received it. Hence it was clearly admissible. And in the form in which it was received by PW5 it cast serious doubt on the critical question whether it was the accused who was the real trafficker. Put differently, it admitted of an inference in the accused's favour on the very issue the prosecution was seeking to establish at the close of its case. In our judgment s 40 does not preclude

A the admission of such evidence. All it prevents is the disclosure of the identity of the informant and any complaint. The word 'complaint' is not defined by the Act. Nor is it defined by s 66 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) which is the applicable definition provision. However, the term 'complaint' is defined by s 2 of the Criminal B Procedure Code ('the Code') as: 'complaint means the allegation made orally or in writing to a magistrate with a view to his taking action under this Code that some person whether known or unknown has committed or is guilty of an offence'. But that definition applies only for the purposes of the Code and not to interpret other legislation such as the Act. Since the point was not fully C argued we find it unnecessary to go into the question as to what 'complaint' in s 40 means. Suffice to say that the information received by PW5 is not a 'complaint' on the facts of this case as it did not implicate the accused as happened in *Alcontara*.

D **[15]** There is another aspect to this part of the case which we must also mention. The learned judge's ruling that the substance of the information was inadmissible was made in breach of the rules of natural justice. As we observed a moment ago, none, including the judge, objected to the evidence being adduced. The point was never raised and an opportunity was not given E to counsel for the defence to submit on why the evidence was not inadmissible. It was therefore not open to the learned judge to *suo moto* to make a ruling that clearly prejudiced the accused without affording him an opportunity to advance arguments on the point. We would in this context refer to the decision of the House of Lords in *Hadmor Productions v Hamilton* F [1983] 1 AC 191. In that case, during arguments before the Court of Appeal, counsel had refrained from referring to speeches in *Hansard* for the purpose of interpreting the particular Act of Parliament. At no time during the course of hearing the appeal did Lord Denning MR who presided indicate that he proposed to refer to *Hansard*. At the time that case was decided it was G accepted that you could not have recourse to *Hansard* to interpret a statute. However, when he came to write his judgment the Master of the Rolls relied on *Hansard*. The House of Lords commented adversely on this. Lord Diplock said:

H > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

I **[16]** The fundamental rule referred to by Lord Diplock was clearly breached in the instance case. However, having regard to the overwhelming evidence in the prosecution's favour on the amended charge of possession we are unable to detect any substantial miscarriage of justice to have been

occasioned despite this serious misdirection on the part of the learned judge. In short, the error by the learned judge has not prejudiced the accused in the final outcome of his case.

[17] For the reasons already given the appeals before us are without merit. They are dismissed. The orders made by the High Court in respect of conviction are affirmed. We will now hear arguments on sentence.

[18] Having heard submissions on the sentences, we find that the only point of any consequence is whether the learned judge was correct in directing the sentences on the two charges to run consecutively. Learned counsel for the accused has argued that since the drugs in question were recovered in the same transaction the learned judge ought to have directed the sentences to run concurrently. In answer, the learned deputy relying on *Mahdi bin Ibrahim Bamadhaj v Public Prosecutor* [2003] 2 SLR 226 has argued that the imposition of consecutive sentences in the present case is appropriate since the drugs are of a different nature from each other. We are in agreement with the learned deputy. The authority cited by her clearly supports the methodology of sentencing adopted by the learned judge. We are therefore disinclined to disturb his order. The sentences of 13 years on the amended first charge and two years on the second charge as well as the sentences of whipping are affirmed.

Appeals dismissed, sentences affirmed.

Reported by K Nesan